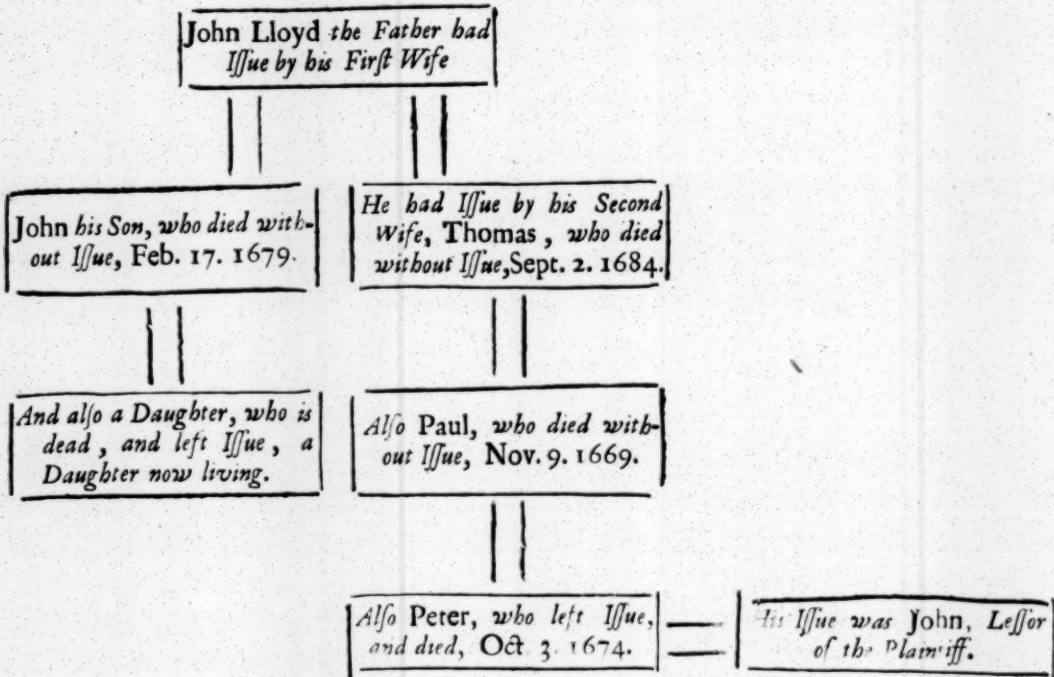


Thomas Lloyd, *Plaintiff.* } *The CASE of the Plaintiff*
John Badger, *Defendant.* } *in the Writ of Error.*

THIS is a Writ of Error to Reverse a Judgment, given in the *Kings-bench*, in an Action of Ejectment, brought for Lands in *Whittington*, in the County of *Salop*, of the Demise of *John Lloyd* Gent. And afterwards Affirm'd in the Exchequer-Chamber.

Where the Case was this :



John Lloyd the father; by his Indenture of Lease and Release, dated the 30th. and 31st. of December, 1649. and made between himself, and *Kynaston*, and *Edwards* of the First part; *John Lloyd* his Son, and *Elizabeth Kynaston* of the Second part, and *Bassano* and *Thynne* of the Third part, in consideration of a Marriage to be had between *John* the Son and *Elizabeth* (and which was had accordingly:) *John* the Father conveys the Lands in question to the Use of himself for 99 Years, if he shall so long live, and after the End or Determination of that Term, to the use of *John* the Son for 99 Years, if he shall so long live; and after the Determination of that Estate, to the Use of *Bassano* and *Thynne*, and their Heirs, for and during the Lives of *John* the Father and *John* the Son, and the Life of the longer Liver of them; and after their Deceases, then to the Use of the First Son of the Body of *John* the Son in Tail-Male; and so on to the Tenth Son; the Remainder to the Trustees for 99 Years for raising of Daughters Portions, the Remainder to *John Lloyd* the Younger, and the Heirs-Male of his Body; And for want of such Issue, the Remainder in Tail-Male to *John* the Father: And for want of such Issue, the Remainder to *John* the Father, his Heirs and Assigns, for ever.

Afterwards (*viz.*) *January the 10th. 1649.* *John the Father,* in the Life-time of *John his Son* (being only possessed of the Lands in question for 99 Years, if he so long lived; and also seized of a Remainder in Tail Male with a Remainder in Fee, to Commence after the Death of his Son *John*, without Issue-Male, **did by his Will** in Writing (*inter alia*) Devise as followeth; **Lastly, my Will is,** That if my Son *John Lloyd* shall die without Issue-Male, lawfully begotten, his Daughters being provided for according to the Indenture in that behalf made, That then my Son *Thomas Lloyd* shall Possess and Enjoy all the Estate in Lands, Houses, and Tythes, which my Son *John Lloyd* had and Enjoyed: And if my Son *Thomas* shall happen to dye without Issue-Male, Lawfully begotten; then my Son *John* shall have and inherit all his Lands, *viz.* *May's T Tirmin Farm, Humphrey Eyton's Farm, and Burgill's Tythes*; and my Son *Paul* to have and enjoy all my Son *Thomas* his Hall Part of *Thomas Hunt's Farm in Suffolk*, that whole Farm to be solely his: And if it shall happen that both my Sons, *John* and *Thomas*, shall die without Issue-Male, Lawfully begotten, **my Will is,** That then my Son *Paul* shall Inherit and Enjoy all my Lands, Houses, Tythes, and whatsoever else I have in the County of *Salop*; and my Son *Peter* shall have and Enjoy all my Lands, Houses, Woods, and whatsoever I have in the Parish of *Backton*, in the County of *Suffolk*: **And if my Son Paul shall die without Issue-Male, Lawfully begotten, and none of his other Brothers Living; Then my Will is,** That my Son *Peter* shall Inherit and Enjoy all their Three Estates, so dying, unto him and his Heirs for ever. Again, if my Son *Peter* shall happen to die before the rest of his Brothers without Issue Male Lawfully begotten; Then my Will is, That all his Lands shall come and descend unto the Eldest of my Sons that then shall be living. Lastly, My Will is, That all my Estate in Lands, Houses, Tythes, and Woods, whatsoever, shall come and descend unto my Name and Posterity, as is before specified, and not to Strangers. **And whatsoever of my Sons shall Survive, and live longer than all the rest or his Brothers; then he to possess all, and Enjoy my Estate, to him, and to his Heirs for ever.** And I do hereby charge all my Sons upon my Blessing, that they perform this my Will; (yet if it should so happen, as I Trust in God it will not) that none of my Sons should have any Issue Male, but Daughters; Then my Will is, That their Daughters shall Inherit my Estate amongst them. And if my Sons have neither Sons nor Daughters (which I trust in God will not be so) Then my Will is, that the Right Heirs of my Father of *Drewe*, within the Parish of *Whittington*, shall Inherit all my Lands, Houses, and Tythes, that I have in the County of *Salop*; And all my Lands, Houses, and Woods that I have in *Backton*, in the County of *Suffolk*, my Grandson *John Bassano* shall have and Enjoy to him and his Heirs for ever.

Shortly afterwards *John* the Father died, and afterwards *John* the Son and his Trustees joined, and suffered a Recovery of the Lands in Question to the Use of *John* the Son for his Life, and after his Decease, to the Use of *Elizabeth* his Wife for her Life; and after her Decease to the Use of the said *John*, and the Heirs Male of his Body (with other Uses therein mentioned, which are out of the Case:) And then it is Lastly said, **That after the determination of these Estates** (which are all determined) **then for such Uses, Estates, Intents and Purposes as are limited, appointed and declared** by the Last Will and Testament of *John* the Father (being the beforemention'd Will) and to and for no other Use, Intent, or Purpose whatsoever.

According to these Settlements, it is humbly conceiv'd, that *John Lloyd*, who was the Lessor of the Plaintiff in the Original Action, hath no Title against *Thomas Lloyd* the Defendant therein, and who is now the Plaintiff in this Writ of Error, for these (among other) Reasons.

- I. **This** is a Contingent Remainder to *Peter*, upon a Contingency which never happened; for when *Paul* died without Issue, all his Brethren were then living.
- II. **If** the Devises are Executory upon *John* and *Thomas's* dying without Issue, then there being no Estates limited to *John* and *Thomas* by the Will, the Devises are void.
- III. **John the Father** having an Estate for 99 Years, if he lived so long, and also being seized of a Remainder in Tail with a Remainder in Fee, after the death of *John* the Son without Issue-Male, makes his Will.
Now *John* the Father had in him a Remainder in Tail Male, which would interpose and discend at the same time with the Remainder in Fee, and so hinder the Devises out of the Remainder in Fee from ever taking Effect in Possession, and the Sons would take as Heirs Male of the Body of the Father; and consequently it must be impossible for the Estates out of the Remainder in Fee limited in the Devise, to come in; and the disposition of a Remainder which can never by any possibility take Effect in Possession (as in this Case) is void, and therefore the Devise here is void.
- IV. **By** the Recovery of *John* the Son, and Deed to lead the Uses thereof, the Will of *John* the Father, and all the Estates depending thereupon as well in Possession as Remainder, were destroyed; so that thereby all the Limitations of the Will became totally void. Then when *John* the Son in his Deed declared the Uses in the Recovery to be (after the determination of some Estates therein mention'd, and which are determin'd) to such Uses, Intents and Purposes, as are limited, appointed, and declared by the Last Will and Testament of *John* the Father, it referred to that which was totally annulled, and the Will of *John* the Father being destroyed by this Recovery, The Deed to lead the Uses thereof, directs the Recovery to such Uses as are in the Will; so that whatever Estates do arise upon this Recovery, must so arise by Virtue of this Deed; And then by Law the Deed can never maintain those Uses, but they are absolutely void.

Obj. **That** these are Remainders in Tail vested.

Ans. To make such a Construction, is to make a New Will different from what the Testator intended: It is to Reject the Words used; [**None of his Brother's living:**] Or else it is to add Words, [**or their Issue**] which the Testator never thought of: For by the whole Contexture of the Will, it appears, that he design'd a Preference of the Eldest, and a Benefit to the Survivor of his Sons, without having so much Regard to their Issue, as they on the other side would intend; and it is not material whether his Will was the wisest and most prudent that could be framed; But what was his Will; And that is express, *viz.* That *Peter* was not to have it upon *Paul's* death if there were any other Brother then living: Wherefore it is hoped that the Judgment shall be Reversed.

It is to be observed, that *John Lloyd* who by his Lessee *John Badger* sueth for these Lands, is not Heir at Law of this Family.

THO. POWYS.